CITATION: Chowdhury v. H.M.Q., 2014 ONSC 2635
COURT FILE NO.: M065/14
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ONTARIO

SUPERIOR COURT OF JUSTICE
Toronto Region

B E T W E E N:	)	
	)	
ABUL HASAN CHOWDHURY	)	*B. H. Greenspan, S. P. Weinstein & P. Hamm,* for the applicant
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA	)	*R. Roy, T. Gilliam & A. Wiese*, for the respondent
	)	
	)	
Respondent	)	
	)	
	)	**HEARD:** April 7, 2014

NORDHEIMER J.:

[1] This application raises the question: does the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 extend Canada's jurisdiction to a foreign national for the purposes of charging him with an offence under the *CFPOA*?

Background

[2] This application proceeded on the express agreement that the factual foundation for the application would be based on the synopsis that was prepared for the preliminary hearing

pursuant to s. 540(7) of the *Criminal Code* along with a witness statement from a key prosecution witness who also gave evidence at the preliminary hearing.[1]

[3] The applicant is one of five individuals jointly charged with one count of bribing a foreign public official. The precise charge set out in the indictment is:

> That Mohammad ISMAIL, Ramesh SHAH, Kevin WALLACE, Zulfiquar Ali BHUIYAN and Abul Hasan CHOWDHURY between 1st day of December in the year 2009 and the 1st day of September in the year 2011, in Oakville and elsewhere in the Province of Ontario, and in Bangladesh, did, in order to obtain or retain an advantage in the course of business of SNC Lavalin Group Inc, directly or indirectly offer, or agree to give or offer a reward, advantage or benefit of any kind to foreign public officials of the Republic of Bangladesh or to any person for the benefit of foreign public officials of the Republic of Bangladesh to induce the officials to use their position to influence acts or decisions of the Republic of Bangladesh for which the officials perform duties or functions, in particular the awarding of a contract for the supervision and consultancy services, for the construction of the PADMA multipurpose Bridge, and did thereby commit an indictable offence contrary to paragraph 3(1)(b) of the Corruption of Foreign Officials Act.

[4] The Crown alleges that the applicant, acting as an agent for SNC Lavalin Group Inc., a Canadian corporation, offered bribes to foreign public officials in Bangladesh and that he agreed with others, including the other accused persons, to do so. The alleged purpose of the bribes was to obtain for SNC Lavalin a contract to provide consultancy services for the building of what is referred to as the Padma bridge. The Padma bridge is a mixed road and rail bridge approximately six kilometres long that will cross the Padma River and thus connect the southwest portions of Bangladesh with the country's capital, Dhaka. It is alleged that, between 2009 and 2011, the Bangladeshi Minister of Communications, the Secretary of Roads, the Bangladesh Bridge Authority Executive Director and the nephew of the then Prime Minister of Bangladesh were targets or willing participants in the bribery offers.

[5] Three of the accused persons are former employees of SNC Lavalin. Ismail was Director, International Projects. Ismail reported to Shah who was Vice-President of the International Division. Shah reported to Wallace who was Vice-President, Energy and Industrial and was the senior SNC Lavalin executive assigned to the Padma Project. Bhuiyan is a

[1] At the time of the preliminary hearing, the accused were Shah and Ismail only. Thereafter, the other accused were added to the proceeding and the Deputy Attorney General of Canada preferred a direct indictment.

Bangladeshi and Canadian Citizen. It is alleged that Bhuiyan was the representative of the applicant in this scheme. His job was to co-ordinate "things" on behalf of the applicant. It is further alleged that the applicant was known in the bribery scheme by the pseudonym "Kaiser".

[6] The applicant is a Bangladeshi citizen and resident of Bangladesh. He is the former Interior Minister of Bangladesh as well as a former Minister of State. He is not, and never has been, a Canadian citizen nor has he ever been a resident of Canada nor is there any evidence that he has ever been to Canada. The applicant is alleged to have been paid to exert influence over the selection committee for the Padma bridge project in favour of SNC Lavalin. All of the conduct of the applicant in furtherance of the alleged bribery scheme is said to have occurred in Bangladesh. The applicant is not alleged to have committed any specific acts within Canada.[2]

[7] The Crown has not sought a warrant for the arrest of the applicant. Bangladesh and Canada do not have an extradition treaty. There is no suggestion that Canada has otherwise attempted to have Bangladesh surrender the applicant for prosecution in Canada.

[8] In this application, the applicant seeks an order of prohibition with *certiorari* in aid "to prohibit the Crown from proceeding in Canada with the charge" against the applicant under the *CFPOA*. The Crown submits that the application is improperly framed and that the proper application is for an order quashing the indictment "for want of territorial jurisdiction" to try the offence. As it turns out, neither of these orders may be the proper form of relief to be granted, if any.

Analysis

[9] Before beginning the analysis it is helpful to outline some basic concepts about the different forms of, and bases for, the jurisdiction exercised by states over offences with transnational or international aspects. The three general forms of jurisdiction are known as prescriptive, enforcement, and adjudicative jurisdiction. They were described by LeBel J. in *R. v. Hape*, [2007] 2 S.C.R. 292, at para. 58:

> Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding

[2] Respondent's factum, para. 22.

> upon persons and entities. The legislature exercises prescriptive jurisdiction in enacting legislation. Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. … Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force. [citations omitted]

[10] The different forms of jurisdiction often overlap in real world legal problems. In this case the interplay is between prescriptive jurisdiction and adjudicative jurisdiction. Specifically, whether Parliament's legislation concerning the bribery of foreign officials brings a foreign national, whose acts in respect of the alleged offence were undertaken wholly outside of Canada, within the jurisdiction of this court.

[11] There are also different bases for jurisdiction, whatever its form. Territoriality is the primary basis for criminal jurisdiction: *R. v. Libman*, [1985] 2 S.C.R. 178, at para. 11. In recent decades however, bright territorial lines have blurred as economies globalize and modern developments in travel and information technology lead to more transnational and international criminal activity. Where a crime takes place in two states, states may have concurrent claims to jurisdiction over the offence. In these situations "qualified territoriality" (in effect, an extended notion of the territoriality principle) can ground Canada's jurisdiction over an offence where a real and substantial link exists between the offence and Canada and the assertion of jurisdiction would not offend the principle of international comity: *Libman* at paras. 71 & 74.

[12] Alternative bases for jurisdiction exist. These include jurisdiction based on nationality (jurisdiction exercised by a state over its own nationals for acts committed abroad) and universal jurisdiction (jurisdiction by a state over acts committed, in other countries, by foreigners against other foreigners based on the seriousness of the crime): *Hape*, at paras. 60-61.

[13] Where adjudicative jurisdiction is asserted over an alleged offence, a court must have jurisdiction over both the offence and the person accused of the offence. The two are separate and discrete issues. As Doherty J.A. succinctly said in *United States of America v. Kavaratzis* (2006), 208 C.C.C. (3d) 139 (Ont. C.A.), at para. 18:

> Jurisdiction over an accused is distinct from jurisdiction over an offence.

This dimension of jurisdiction is less commented upon but it is crucial to the resolution of this application.

[14] With the foregoing in mind, the analysis in this case properly starts with s. 6(2) of the *Criminal Code* which reads:

> Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.

This section provides a general prohibition against the extraterritorial jurisdiction of Canadian courts.

[15] There are statutory exceptions to this general prohibition which draw variously from the different bases for jurisdiction described above. For example, s. 7 of the *Criminal Code* extends the criminal law jurisdiction of Canadian courts to offences that occur on planes while in flight, to a Canadian crew member during a space flight, to offences against diplomats, to offences involving nuclear material and to terrorism offences, among others. By way of further example, the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 provides for universal jurisdiction of Canadian courts over genocide, a crime against humanity, or a war crime committed outside Canada if certain stipulated requirements are met.

[16] In addition to those specific provisions, s. 470 of the *Criminal Code* adds a further general jurisdiction provision. It provides that every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused if the accused person "is found, is arrested or is in custody within the territorial jurisdiction of the court". This is an uncontroversial assertion of jurisdiction over the person on the basis of territoriality.

[17] The problem in this case, of course, is that the applicant is not now, nor has he ever been, within Canada. He is not a Canadian citizen. He is a citizen of Bangladesh and his actions in relation to this alleged offence were all undertaken within Bangladesh. The question is whether a charge under the *CFPOA* gives this court jurisdiction over the applicant.

[18] Section 3 of the *CFPOA* reads:

> Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
>
> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

[19] The *CFPOA* adopts the definition of the word "person" as it appears in s. 2 of the *Criminal Code*. One will see from a review of that definition that is it not at all useful for the purposes of this issue.[3] Superficially, the language of the *CFPOA* uses the word "person" in an unrestricted fashion. It is not expressly tied to citizenship, geographic location or residency. The ordinary meaning of the word "person" would, therefore, appear to include the applicant. That point, however, begs the question whether it is intended that the *CFPOA* include within its reach foreign nationals with no connections to Canada and whose actions, allegedly giving rise to the offence, were undertaken wholly outside of Canada.

[20] In this regard, the general rule when interpreting a statute is that Parliament is presumed to have intended to pass legislation that will accord with the principles of international law. This point is made clear in *Hape* where LeBel J. said, at para. 53:

> It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law.

It is, of course, open to Parliament to pass legislation that conflicts with international law but if it wishes that result, it must do so clearly and expressly.

[21] The decision in *Hape* dealt with the issue of the "extraterritorial application" of Canadian law. It noted the general prohibition in s. 6(2) of the *Criminal Code* that I have set out above. The court went on to find that Parliament has "clear constitutional authority" to pass legislation governing conduct by non-Canadians outside of Canada. However, in exercising that authority, the court noted certain parameters that will generally apply. LeBel J. said, at para. 68:

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[3] On this point, s. 2 reads: "every one", "person" and "owner", and similar expressions, include Her Majesty and an organization.

> [Parliament's] ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law.

[22] A basic part of international law is the principle of sovereign equality. Countries generally respect each other's borders and will not attempt to adjudicate matters that occurred within the borders of another sovereign country. Similarly, countries will exercise jurisdiction over their own nationals but not over another country's nationals except, of course, where that country's nationals commit an offence within another country's borders.

[23] Nevertheless, there are situations where a country will reach beyond its borders to prosecute individuals who commit an offence in another country. This normally only occurs where the offence committed in the other country is committed by the first country's own nationals or where the harm arising from the criminal acts in the other country is visited upon the citizens of the first country. In the former case, the basis for jurisdiction is nationality. At common law, we recognize that Canada may have a legitimate interest in prosecuting an offence involving the actions of Canadians outside of our borders. In the latter case, the basis for jurisdiction is qualified territoriality, which extends the notion of territorial jurisdiction beyond our strict borders. Under the "objective territorial principle", Canada will have a legitimate interest in prosecuting non-Canadians for criminal actions that cause harm in Canada provided a real and substantial link between the offence and Canada is established and international comity is not offended.: *Libman*; *Hape* at para. 59; Robert J. Currie, *International & Transnational Criminal Law* (Toronto: Irwin Law, 2010) at pp. 63-65.

[24] The main authority on the objective territoriality principle is the decision of the Supreme Court of Canada in *Libman*. In that case, La Forest J. reviewed in detail the development of the law in this regard both in England and in Canada. He began by explaining the genesis for what is now s. 6(2) of the *Criminal Code*, at para. 11:

> The primary basis of criminal jurisdiction is territorial. The reasons for this are obvious. States ordinarily have little interest in prohibiting activities that occur abroad and they are, as well, hesitant to incur the displeasure of other states by indiscriminate attempts to control activities that take place wholly within the boundaries of those other countries; [citation omitted]

[25] There was an exception to this general rule, though, where harm was caused in Canada arising from activities that occurred in another country. The decision in *Libman* recognized that Canada has an interest in protecting its citizens from the actions of persons taking place in other countries. La Forest J. cited with approval the following observation from Lord Diplock in *Treacy v. Director of Public Prosecutions*, [1971] A.C. 537 at p. 562:

> Comity gives no right to a state to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another state. It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts.

[26] This exception raises the question as to when it is appropriate for Canada to assume jurisdiction over an offence that occurred, in whole or in part, from actions undertaken outside of Canada but that caused harm to persons within Canada. The answer to that question led to the adoption of the "real and substantial link" test. In that regard, La Forest J. said, at para. 74:

> I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well known in public and private international law; [citations omitted]

[27] The difficulty, of course, is that the real and substantial link test, and all of the discussion surrounding it, deals with the issue of jurisdiction over the offence. It does not deal with the issue of jurisdiction over the person. As previously noted, the two are separate and discrete issues.

[28] This poses a particular problem in this case since I agree with counsel for the applicant that almost all of the existing authorities deal with offence jurisdiction and not personal jurisdiction. There is precious little discussion about when it is appropriate, if ever, for one country to assume jurisdiction over the actions of another country's nationals for acts done in that national's home country.

[29] There are, however, some general principles of international law that apply to this issue. They were canvassed, to some extent, in *Hape* where the issue was the application of the *Canadian Charter of Rights and Freedoms* to investigative actions taken abroad. LeBel J. noted that one of the key principles of international law "is respect for the sovereignty of foreign states". He observed that all states, regardless of their political philosophies or systems, appear to agree on the need for the recognition of sovereign equality. LeBel J. pointed out that sovereign equality "comprises two distinct but complementary concepts: sovereignty and equality". He added, at para. 41:

> "Sovereignty" refers to the various powers, rights and duties that accompany statehood under international law. Jurisdiction - the power to exercise authority over persons, conduct and events - is one aspect of state sovereignty. Although the two are not coterminous, jurisdiction may be seen as the quintessential feature of sovereignty. [emphasis added]

[30] In terms of the concept of equality, LeBel J. noted the importance of non-intervention. He said, at para. 45:

> In order to preserve sovereignty and equality, the rights and powers of all states carry correlative duties, at the apex of which sits the principle of non-intervention. Each state's exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference.

[31] This discussion leads, in turn, to a consideration of another important principle of international law and that is the principle of comity between nations. Comity has been referred to as the "deference and respect" that states owe to each other. It was defined by LeBel J., at para. 47:

> Related to the principle of sovereign equality is the concept of comity of nations. Comity refers to informal acts performed and rules observed by states in their mutual relations out of, politeness, convenience and goodwill, rather than strict legal obligation: [citation omitted]. When cited by the courts, comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations.

[32] In using comity as a principle of interpretation, there are two presumptions. One is that Canada will, in passing legislation, act in compliance with its international obligations including treaty obligations. The other is that the courts will favour an interpretation of legislation that

reflects the values and principles of international law. When it comes to the issue of jurisdiction, the principles of international law set the limits. As LeBel J. said, at para. 59:

> International law - and in particular the overarching customary principle of sovereign equality - sets the limits of state jurisdiction, while domestic law determines how and to what extent a state will assert its jurisdiction within those limits. Under international law, states may assert jurisdiction in its various forms on several recognized grounds. The primary basis for jurisdiction is territoriality: *Libman*, at p. 183. It is as a result of its territorial sovereignty that a state has plenary authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising and people residing within its borders, and this authority is limited only by the dictates of customary and conventional international law. [emphasis added]

[33] Many decisions, *Hape* and *Libman* included, have recognized that as the world becomes smaller, in the sense of the increased ease with which persons can travel and communicate around the world, criminal conduct that crosses borders will be increasingly frequent. As a consequence, there will be times when more than one state will have a claim for jurisdiction over a criminal offence. The decision in *Hape* also pointed out that, when these conflicts or overlaps occur, the most common claim of jurisdiction will be based on the nationality principle, that is, a state taking jurisdiction over an offence committed outside its borders because that state's nationals are involved. A cautionary note was sounded, though, that how and when that jurisdiction may be exercised depends on the location of the state's nationals. As LeBel J. said, at para. 60:

> Under international law, a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state's own borders. When a state's nationals are physically located in the territory of another state, its authority over them is strictly limited.

[34] In attempting to exercise this form of jurisdiction the overarching principle is still that of sovereign equality. Even when a state is purporting to take jurisdiction over an offence outside of its borders because it nationals are involved, that state must still respect the sovereignty of other states. In particular, a state cannot seek to enforce its laws when to do so would infringe on the sovereignty of another state. LeBel J. said, at para. 65:

> While extraterritorial jurisdiction - prescriptive, enforcement or adjudicative - exists under international law, it is subject to strict limits under international law that are based on sovereign equality, non-intervention and the territoriality principle. According to the principle of non-intervention, states must refrain from exercising extraterritorial enforcement jurisdiction over matters in respect of which another state has, by virtue of territorial sovereignty, the authority to decide freely and autonomously [citation omitted].

[35] There is a last point to be taken from *Hape* and that is with respect to the issue that arises here, namely, the assumption of jurisdiction over foreign nationals. The court in *Hape* held that it was open to Parliament to pass legislation that sought to govern conduct by non-Canadians outside of Canada. The court pointed out, however, that if Parliament chose to do so, Parliament would likely be violating international law and would also likely offend the comity of nations. Again, LeBel J. said, at para. 68:

> Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada. Its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. By virtue of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with those principles, but in so doing it would violate international law and offend the comity of nations.

[36] As a consequence of that reality, courts will approach the interpretation of any legislation with the presumption that Parliament did not intend to violate international law and offend the comity of nations. Thus, absent clear language compelling such an interpretation, courts will adopt an interpretation that leads to the opposite outcome.

[37] At the risk of being repetitive, but so that it is clear, there is a distinction between Canada extending its jurisdiction over the offence, because the offence has some extraterritorial aspects, and Canada extending its jurisdiction over a person who is outside of Canada's territorial jurisdiction. Jurisdiction over the former is governed by the "real and substantial link" test set out in *Libman*. The latter is governed by the legislative language used in the offence creating statute. This point is made by Robert J. Currie in *International & Transnational Criminal Law* where the author observes, at p. 421:

> When Parliament wishes the courts to take extraterritorial jurisdiction over persons or conduct completely outside Canadian borders, it must instruct the courts to this effect by making it explicit or necessarily implied in the legislation. Otherwise, territorial jurisdiction – as expanded by the *Libman* criteria – is the default.

[38] This distinction is a long standing one. It was referred to, for example, by the House of Lords in *Berkeley v. Thompson* (1884), 10 App. Cas. 45 where the Earl of Selborne, L.C. said, at p. 49:

> … because the general principle of law is, 'Actor sequitur forum Rei;' not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal; and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is prima facie not subject to the process of a foreign Court -- he must be found within the jurisdiction to be bound by it. [emphasis added]

[39] I do not quarrel with the Crown's contention that Canada has jurisdiction over the offence here. Indeed, I do not perceive the applicant to dispute that contention. Many of the acts constituting the offence took place in Canada, the investigation was conducted here and the bulk of the evidence was gathered here. Under the *CFPOA*, Canada has a legitimate interest in assuming jurisdiction for the purpose of prosecuting persons involved in an international bribery scheme that has its genesis in Canada. The issue is whether the same conclusion can be reached regarding Canada's right to assume jurisdiction over the prosecution of the applicant.

[40] In this case, the Crown urges an interpretation of the *CFPOA* that would capture the conduct of non-Canadians outside of Canada. That is the gravamen of the allegations against the applicant in the charge that is before this court. I repeat that the applicant is neither a citizen nor a resident of Canada and his actions in furtherance of the alleged bribery scheme all took place in Bangladesh. The question is whether the *CFPOA* either expressly or by necessary implication extends Canada's jurisdiction over foreign nationals whose conduct occurred outside of Canada in relation to an offence over which Canada has properly assumed jurisdiction.

[41] In interpreting the *CFPOA*, one must be governed, as I have explained above, by the principle that Parliament is not to be seen as intending to legislate in a fashion that conflicts with Canada's international obligations. While I appreciate that Canada has international obligations

to investigate and prosecute instances of the bribery of foreign officials[4], those international obligations do not carry with them either the right or the requirement to interfere with the sovereignty of other countries, especially over their own citizens. This is where the principle of international comity becomes of considerable importance in the interpretive exercise for the reasons that I have already given.

[42] There is nothing in the language of s. 3 of the *CFPOA* that expressly makes foreign nationals subject to it. While the use of the words "every person" might superficially attract such a result, the section does not expressly say so. On this point, I contrast the language in s. 3 with the language that now[5] appears in s. 5 of the *CFPOA* that reads in part:

> (1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 or 4 - or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under that section - is deemed to have committed that act or omission in Canada if the person is
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> (a) a Canadian citizen;
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> (b) a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act who, after the commission of the act or omission, is present in Canada; or
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> (c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

[43] Two aspects of the wording of s. 5 are noteworthy. One is that s. 5 expressly refers to a person "who commits an act or omission outside Canada". No equivalent wording is found in s. 3. The other is that the wording in s. 5 itself implies that s. 3 applies only to acts that occur in Canada since s. 5 refers to acts or omissions that "if committed in Canada" would constitute an offence under s. 3. This latter point presents a strong argument against the contention that s. 3 impliedly captures the actions of persons who are both outside of Canada themselves and whose actions occur outside of Canada.

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[4] Canada is a signatory to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

[5] The *CFPOA* was amended in 2013 to include s. 5.

[44] Further support can be found for an interpretation of s. 3, that does not give it extraterritorial jurisdiction over the person, in the enactment of s. 5 itself. Section 5 is clearly aimed at giving our courts jurisdiction over the actions of Canadians outside of Canada insofar as they constitute an offence under the *CFPOA*. Presumably, prior to the enactment of s. 5, our courts had no jurisdiction over the actions of Canadians outside of Canada under the *CFPOA*, otherwise it would not have been necessary to add s. 5 to the statute. If that is so, it would seem a strange result to conclude that the proper interpretation of s. 3 is, and always has been, that it provides jurisdiction over non-Canadians. In other words, if the Crown's interpretation of s. 3 is correct, prior to the enactment of s. 5, our courts had greater jurisdiction over the actions of foreign nationals outside of Canada than it did over our own nationals outside of Canada.

[45] The Crown submits that s. 5 was added to provide for jurisdiction over offenders on the basis of nationality, thus obviating the need for the real and substantial link test to be met and providing a short cut to jurisdiction that does not rely on territoriality. The Crown points to a guide that was prepared by the Department of Justice to assist in understanding the *CFPOA* and, in particular, to a portion of it that reads, in relation to s. 3:

> This offence is intended to apply to every person, whether Canadian or not, and within the full meaning of "person" as defined in section 2 of the Criminal Code.

[46] I do not find that portion of the guide helpful to this issue because, in referring to persons "whether Canadian or not" there is no mention of residency or location of those individuals. As I shall explain below, Canada may be able to gain jurisdiction over foreign nationals who are present in Canada but that is not this case. The other point, which is an obvious one, is that a government guide may or may not accurately reflect the scope of legislation. It is the legislation itself that determines its scope.

[47] The Crown also points to evidence from the Standing Senate Committee on Foreign Affairs and International Trade when that committee considered the amending legislation that added s. 5 to the *CFPOA*. The legal advisor from Foreign Affairs and International Trade told the Committee:

> Alan H. Kessel: This bill applies to Canadians, to residents, to companies and to Canadian members of those companies. If there were someone who was not

> Canadian, then the usual practice of a substantial link to Canada would be the process by which they would be caught under our law. We get the whole basket.

[48] If the reference to "a substantial link to Canada" was intended to refer to the test from *Libman*, then, with respect, that comment confuses jurisdiction over the offence with jurisdiction over the person, as I have already explained. The issue here appears to have been more directly addressed by the Minister of Foreign Affairs when he told the Committee:

> Mr. Baird: At the same time, if they are not a Canadian resident, they are not a Canadian citizen, and so it is very difficult for us to capture them. We are a sovereign country and if they are a citizen of another sovereign country, we would hope that their host country would share our commitment to combating corruption.

[49] It appears that it was the Minister's view that foreign nationals were not caught by the *CFPOA*, that Canada would not have jurisdiction over them and that it would be up to their host country to decide on any prosecution of them.

[50] The Crown submits that such an interpretation would allow the applicant to get away with his activities "with impunity". Indeed, that may well be the result but, if it is, it is because the authorities in Bangladesh will have decided not to prosecute the applicant for any involvement he had in these matters and not to surrender him to Canada for prosecution here. Those are both decisions that a sovereign country is entitled to make in respect of one of its citizens. I can think of few greater infringements on the sovereignty of a foreign state than for Canada to say that it will pre-empt or overrule those conclusions by purporting to prosecute the applicant in this country where his own country has declined to do so.

[51] In addition to those considerations, the principle of international comity argues against an interpretation of s. 3 that would bring foreign nationals within its ambit. A state's sovereignty is at its peak when it is dealing with its own citizens and their actions within that state's own borders. As Cory J. said, in explaining s. 6(2) of the *Criminal Code* in *R. v. Finta*, [1994] 1 S.C.R. 701, at p. 806:

> This rule reflects the principle of sovereign integrity, which dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real or personal, within its own territory. [emphasis added]

[52] There is a fundamental problem, to which I have already referred and that should be self-evident, with the concept that a foreign state would purport to prosecute a citizen of another country who is resident in his/her country for actions taken within that citizen's own country.

[53] The Crown referred to a number of cases in an effort to support its position including *R. v. Karigar*, [2013] O.J. No. 3661 (S.C.J.), *Liangsiriprasert v. U.S. Government et al*, [1991] 1 A.C. 225 (P.C.), *R. v. Greco*, [2001] O.J. No. 4147 (C.A.) and *R. v. Ruggiero*, [1983] O.J. No. 2330 (O.C.J.). With respect I do not find any of those cases to be particularly helpful on the issue that is before me. In *Karigar*, the accused was a Canadian businessman who resided in Toronto. In *Greco*, both the accused and the victim were residents of Ontario. In *Ruggiero*, it appears that the accused was in Toronto. In *Liangsiriprasert*, the accused was physically present in Hong Kong when he was made the subject of an extradition request by the United States of America. None of these cases deal with the situation of an attempt to prosecute a foreign national in Canada who has no connections to Canada and who is not present here. Indeed, I was not provided with any case that directly addressed this situation. I do not know whether that is because the situation rarely arises or because countries do not generally attempt to prosecute the citizens of other countries or for some other reason.

[54] In the end result, the position of the Crown appears to be that once Canada has jurisdiction over the offence, it has jurisdiction over all of the parties to that offence. I do not accept that proposition because it conflates the question of jurisdiction over the offence with the question of jurisdiction over the person. The existing authorities make it clear that these are two separate and distinct questions. Canada can achieve an affirmative answer to the first question but that does not lead inexorably to an affirmative answer to the second question. The mere fact that the applicant is a party to the offence is not sufficient, in my view, to give Canada jurisdiction over him unless and until the applicant either physically attends in Canada or Bangladesh offers to surrender him to Canada.

[55] This latter point is made out in some of the cases to which I have already referred. For example, in *Treacy*, Lord Diplock twice alludes to the fact that the English courts could gain jurisdiction over a foreign national if that person comes into the United Kingdom. Lord Diplock said, at p. 562:

> Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences upon victims in England. […] It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts. [emphasis added]

[56] The same point is made in *Liangsiriprasert* where Lord Griffiths said, at p. 250:

> If the inchoate crime is aimed at England with the consequent injury to English society why should the English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within the jurisdiction or through extradition procedures? [emphasis added]

[57] I accept, therefore, that if Canada was able to "lay hands" on the applicant, Canada would then have the jurisdiction to try the applicant for an offence under the *CFPOA* over which Canada also has jurisdiction. Until that should happen to occur, the *CFPOA* does not extend Canada's jurisdiction to the applicant for the purposes of prosecuting him under that statute.

[58] Given that conclusion, a thorny issue is raised over what the appropriate remedy is in this case.

Remedy

[59] As the Crown pointed out in its factum, the determination of jurisdiction is a factual exercise that should ordinarily be undertaken, at the earliest, at the conclusion of the Crown's case. However, for very good and sound reasons, the parties here agreed that the issue could be, and should be, determined at this earlier stage provided that the factual foundation for the determination of the issue was agreed to – as it was. There is a distinct advantage to be gained, for the purposes of the continued prosecution involving the other accused persons, to know whether the applicant is or is not part of the proceeding. There are many other issues to be addressed in this prosecution in which the applicant would have an interest, if he is properly part of the prosecution. It is to everyone's benefit to have that issue decided sooner rather than later.

[60] However, the practical result of determining the issue now is that there remains the possibility that Canada could obtain custody of the applicant in the future and before the

prosecution of the other individuals concludes. That possibility, it seems to me, makes the remedy of prohibition sought by the applicant an inappropriate one. Similarly, the Crown's position that the appropriate remedy is to quash the indictment for want of territorial jurisdiction is also not the appropriate remedy, for one, because the issue is not territorial jurisdiction over the offence but jurisdiction over the person and, for the other, if the indictment were to be quashed, and Canada did subsequently obtain custody of the applicant, there would be no basis to arrest him.

[61] As a consequence, it seems to me that the appropriate remedy, given that Canada does not currently have jurisdiction over the applicant and, to date, has apparently made no efforts to gain custody of him, is to grant a stay of the prosecution as it relates to the applicant. If the situation should change, such that Canada gains jurisdiction over the applicant, the Crown could then seek to lift the stay in order to continue with the prosecution.

[62] For these reasons, I grant an order staying the prosecution against the applicant for want of jurisdiction over him.

NORDHEIMER J.

Released: April 28, 2014

CITATION: Chowdhury v. H.M.Q., 2014 ONSC 2635
COURT FILE NO.: M065/14

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

- and -

ABUL HASAN CHOWDHURY

Applicant

REASONS FOR DECISION

NORDHEIMER J.

RELEASED: